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Anonymous Online Speech, John Doe Lawsuits, and the First Amendment

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An author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995)

[The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)

Among the cherished freedoms protected by the First Amendment is the right to speak anonymously. Indeed, anonymous speech has played an important role throughout this nation's history: colonial patriots writing against the abuses of the English crown "frequently had to conceal their authorship or distribution of literature," and even "the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names."[1] "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[2] "Anonymity [also] provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[3]

1 Talley v. California, 362 U.S. 60, 65 (1960).
2 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995).
3 *Id.* at 342.

Today, the right to speak anonymously is most frequently exercised via the Internet, including through email, message boards, and social media websites. As the U.S. Supreme Court recognized nearly twenty years ago, at the dawn of the information age, anyone with an Internet connection "can become a pamphleteer" or a "town crier with a voice that resonates farther than it could from any soapbox."[4] In 1997, the year *Reno* was decided, the U.S. Census Bureau reported that approximately 18% of households had Internet access; as of 2011, that number had jumped to 72%. The vast majority of the U.S. population is now able to easily and inexpensively express themselves, creating an army of anonymous pamphleteers and town criers.

4 Reno v. American Civil Liberties Union, 521 U.S. 844, 851 (1997).

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But although a modern-day Publius may believe that his or her online speech is truly anonymous, the Internet also creates unprecedented tools with which to unmask a speaker's identity. Internet service providers such as Comcast and Verizon, email and search companies such as Google and Yahoo, and social media platforms such as Facebook and Twitter all regularly track and monitor users' online activities. Users may be identified by IP addresses, cookies (*i.e.*, data stored in a user's web browser), or information such as credit card numbers provided by the user during a sign-up process. Accordingly, no matter what steps an Internet speaker may take to remain anonymous, to identify that speaker, a person need only file a lawsuit against a "John Doe" defendant[5] and issue a subpoena to the relevant Internet service provider or other new media company seeking that identity.

Such "John Doe" lawsuits have become increasingly common as the Internet becomes ever more ubiquitous. Of course, plaintiffs do sometimes have legitimate claims against anonymous Internet speakers, who may use the cloak of anonymity in an attempt to defame with impunity. Frequently, however, plaintiffs will "bring suit merely to unmask the identities of anonymous critics."[6] In other words, plaintiffs may use a John Doe subpoena not to pursue legitimate defamation claims, but to intimidate and silence a legitimate viewpoint – the very evils the First Amendment was adopted to protect against.

Due to the increased use and potential abuse of such John Doe subpoenas, the job of sorting out claims involving the right to speak anonymously increasingly has fallen to the judiciary. As discussed below, state courts have been particularly quick to react to developments in this area, although similar issues have been percolating in the federal courts as well.[7] These courts have recognized the need to balance an Internet speaker's First Amendment right to engage in anonymous speech against society's interest in preventing defamation and other inappropriate – and unprotected – speech.

For the most part, courts have attempted to balance the competing rights and interests implicated by John Doe subpoenas by requiring the plaintiff to make some showing on the merits before ordering compliance with a subpoena requesting the disclosure of the John Doe defendant's identity. As a general matter, these courts require at a minimum that (1) the plaintiff and/or the court attempt to notify the anonymous speaker of the request to discover his or her identity and (2) the plaintiff produce evidence supporting each element of the defamation claim (except for elements that are uniquely within the control of the John Doe defendant, such as malice). Some courts also mandate an equitable balancing of the John Doe defendant's First Amendment rights against the strength of the plaintiff's evidentiary showing. Other courts have concluded that such an additional equitable balancing step is unnecessary or have imposed other requirements (*e.g.*, a showing that the requested information is important or necessary to permitting the plaintiff to proceed with his or her lawsuit).

Jurisdictions that have required plaintiff to meet some version of a judicially crafted First Amendment balancing test prior to enforcement of a subpoena seeking disclosure of a John Doe defendant's identity include, but are not limited to, Arizona, California, Delaware, the District of Columbia, Indiana, Kentucky, Maryland, Michigan, New Hampshire, New Jersey, Pennsylvania, and Texas. Similar requirements have been prescribed by statute or court rulings in jurisdictions that do not permit suits to be brought against unidentified "John Doe" defendants but that do permit some form of pre-litigation discovery. Illinois, New York, Virginia, and Wisconsin all require some form of evidentiary showing to obtain pre-litigation discovery and have applied these rules to require plaintiffs to make such a showing before granting discovery petitions seeking the identity of anonymous Internet speakers.

The facts underlying these cases are as diverse as are the types of Internet speech, and a full accounting of the case law is an undertaking that far surpasses the space allotted for this article. Nevertheless, it is worthwhile to familiarize oneself with some of the basic fact patterns these cases generally take, which may be illustrated by a brief synopsis of a few of the seminal cases in this area:

In *Dendrite International, Inc. v. Doe No. 3*,[8] an anonymous individual using the pseudonym "xxplrr" posted on a Yahoo bulletin board a series of comments critical of changes in Dendrite's revenue-recognition accounting. Dendrite, a New Jersey company, sued the anonymous commenter for defamation and misappropriation of trade secrets and sought discovery regarding the commenter's identity.

In *Doe No. 1 v. Cahill*,[9] an anonymous individual using the alias "Proud Citizen" posted comments on a local blog that were critical of Patrick Cahill, a city councilman. Cahill sued the anonymous commenter for defamation and invasion of privacy. After obtaining the anonymous commenter's IP address from the blog's owner, Cahill issued a subpoena to Comcast, the Internet service provider associated with the IP address, seeking the commenter's identity.

5 A "John Doe" lawsuit or subpoena is one in which the plaintiff does not know the identity of the party or parties to be sued and therefore uses a fictitious name, often "John Doe," to represent the defendant.

6 Doe No. 1 v. Cahill, 884 A.2d 451, 457 (Del. 2005).

7 *See, e.g.*, SaleHoo Grp., Ltd. v. ABC Co., 722 F. Supp. 2d 1210 (W.D. Wash. 2010) (John Doe subpoena issued to GoDaddy seeking the identity of operator of website); USA Techs., Inc. v. Doe, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (John Doe subpoena issued to Yahoo! seeking the identity of anonymous speaker who commented on Internet message board).

8 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

9 884 A.2d 451 (Del. 2005).

In *Mobilisa, Inc. v. Doe No. 1*,[10] the founder and chief executive officer of Mobilisa used his corporate email account to send an "intimate message" to a woman with whom he was involved in a personal relationship. A few days later, members of Mobilisa's management team received an email from an anonymous individual that contained the contents of the personal email with the subject line, "Is this a company you want to work for?" Mobilisa subsequently filed suit against the anonymous email user, alleging unauthorized access to Mobilisa's secure email system, and served a subpoena on the user's email provider seeking the user's identity.

In *Solers, Inc. v. Doe*,[11] an individual used a website reporting form to file a complaint with the Software & Information Industry Association, a trade association for the software and digital content industry, accusing Solers, which develops software for the Department of Defense, of copyright infringement. After the trade association refused to identify the individual to Solers, the company sued him as a John Doe defendant for defamation and tortious interference and served a subpoena on the trade association seeking all documents relating to the individual's identity and the complaint he had filed.

In each of these cases, the court adopted some form of First Amendment balancing test to protect the identity of the anonymous speaker. For example, the *Dendrite* court required (1) notice to the defendant, (2) identification of the exact statements alleged to be defamatory, (3) evidence sufficient to survive a motion for summary judgment, and (4) a balancing of the defendant's First Amendment right against the strength of the plaintiff's evidence. The *Cahill* court, on the other hand, required only (1) notice to the defendant and (2) evidence sufficient to survive a motion for summary judgment. That court expressly disavowed any need for a separate balancing requirement. The *Mobilisa* court generally adopted the *Dendrite* approach but without the requirement to specifically identify the defamatory statement; the *Solers* court generally adopted the *Cahill* approach, but with the additional requirement that the court determine that the information sought is important to enable the plaintiff to proceed with his lawsuit. And courts in other jurisdictions have adopted many variations on the same themes.

Given the wide variety of potential fact patterns and legal tests applicable to John Doe defamation actions, companies or individuals that anticipate taking legal action against anonymous Internet critics would do well to familiarize themselves with the standards applicable in their jurisdiction. Even if there is no precedent directly on point, potential plaintiffs at a minimum should be prepared to meet a summary judgment or similar standard. Moreover, to the extent they have not already done so, Internet service providers and other companies that maintain identifying information about their customers should consider adopting notification policies that will allow First Amendment objections to be raised by anonymous Internet speakers. Finally, where the anonymous defendant has received notice of the action, defense counsel should be prepared to hold the plaintiffs to their burden. ■

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10 170 P.3d 712 (Ariz. Ct. App. 2007).
11 977 A.2d 941 (D.C. 2009).